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In The Supreme Court of The United States

October Term 1959

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

EDGAR WILLIAM DICKENSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

J. F. DuPAUL, City Attorney
By AARON W. REESE and
FREDERICK B. HOLOBOFF
Attorneys for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, entered in the above entitled case on June 19, 1959.

OPINIONS BELOW

No opinion was rendered by the Municipal Court, San Diego Judicial District. An opinion was rendered by the Appellate Department of the Superior Court of the State of California in and for the County of San Diego in which they declared one ordinance of the City of San Diego to be valid under the Constitution of the United States, and another to be invalid.

JURISDICTION

The judgment of the Appellate Department of the Superior Court was pronounced on June 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3).

Article VI, Sec. 5 of the Constitution of the State of California provides: "The Superior Courts shall have appellate jurisdiction in such cases arising in municipal and justice and other inferior courts in their respective counties and cities as may be prescribed by law. The Legislature may, in addition to any other appellate jurisdiction of the Superior Courts, also provide for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments."

The Legislature provided for such appeals in criminal cases by the enactment of Sections 1466-1469 inclusive of the Penal Code of the State of California. Section 1469 thereof provides that the procedure of such

appeals shall be prescribed in rules promulgated by the Judicial Council. The Judicial Council promulgated the Rules on Appeal from the Municipal Courts and Inferior Courts in Criminal Cases effective July 1, 1939. (Rules 1-11)

From the final judgment of the Superior Court after the taking of such an appeal, from the Municipal Court, petitioner has no further appellate remedy under the laws of the State of California. Rule 7 of the Revised Appellate Department Rules promulgated by the Judicial Council effective September 15, 1945, provides that entry of final judgment occurs upon the expiration of 7 days after the same shall have been pronounced.

QUESTIONS PRESENTED

Whether the San Diego Ordinance requiring junk dealers to enclose their premises by a solid fence at least six feet in height, is an unreasonable interference with the carrying out of a lawful business, thereby violating the Due Process Clause of the Fourteenth Amendment, or whether it is a valid exercise of the Police Power of the State.

1) Where the ordinance doesn't specify any material to be used.

2) Where the ordinance is a general police power regulation.

3) Where the ordinance contains aesthetic considerations.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1) The Due Process Clause of the Fourteenth Amendment fo the United States Constitution.

2) San Diego Municipal Code Sec. 33.0903.1 REGULATIONS-ENCLOSED PREMISES

"That such business shall be carried on, maintained or conducted entirely inside an enclosed building or buildings, unless the premises on which such business is carried on, maintained or conducted shall be entirely enclosed by a solid fence or wall at least six (6) feet in height and constructed according to the requirements of the building code of said City."

STATEMENT

This criminal action arose under San Diego Municipal Code Sec. 33.0903.1. The basic facts, which are not in dispute, are as follows: Defendant and appellant EDGAR WILLIAM DICKENSON is the owner of certain premises located at 1936 National Avenue, in the City of San Diego, State of California. That said premises are commercial premises, with a portion of the premises being unfenced on which are located automobiles of various ages and in varying stages of repair. Located on said premises are certain buildings, one consisting of the building fronting on National Avenue, the same being a closed and covered building used for the storage of new and reconditioned parts. To the rear of this building, across a public alley, is a further

enclosed building used for auto repair and reconditioning and for storage of auto parts. That adjacent to this building last mentioned is an enclosed yard, enclosed by a fence at least six feet high and solid in construction; within which confines are stored various used auto parts in various and sundry piles.

The defendant was originally charged with eight counts of violating various subsections of the Auto Wrecking Ordinance of the City of San Diego; he was found guilty after a jury trial of wilfully and unlawfully arranging the premises at 1936 National Avenue so that reasonable inspection and access to all parts of the premises could not be had by proper fire, health, police and building authorities. He was likewise found guilty of the charge that he did unlawfully, at 1936 National Avenue, San Diego, California, carry on the auto wrecking business not entirely inside the enclosed building and said premises were not entirely enclosed by a solid wall, at least six feet high and constructed according to the requirements of the Building Code of the City of San Diego.

Defendant challenged the constitutionality of these ordinances by way of demurrer, and by way of motion for a directed verdict, and in arrest of judgment and by motion for a new trial, each of which motions was denied by the trial court.

Defendant then made appeal to the Appellate Department of the Superior Court of the State of California, in and for the County of San Diego, on the grounds that the ordinance of which he was convicted are unconstitutional in violation of Federal Constitutional requirements.

The Appellate Department of the Superior Court of the State of California in and for the County of San Diego reversed the decision of the lower court on the fencing ordinance count, holding the ordinance to be unconstitutional. The petition for a writ of certiorari is petitioner's first opportunity to raise federal questions although they were raised by defendant earlier in the proceedings.

REASONS FOR GRANTING THE WRIT

Certorari should be granted in the instant case because an important federal question affecting the police power of the state and the Due Process Clause of the Fourteenth Amendment has been decided in a way probably not in accord with applicable decisions of this court.

Certiorari should also be granted in the instant case because the decision in the case of Berman v. Parker, 348 U.S. 26, needs amplification in its application to the scope of the state government's exercise of its police powers.

On November 22, 1954, this court decided Berman v. Parker, 348 U.S. 26, a case wherein the Constitutionality of the District of Columbia Redevelopment Act of 1945 had been challenged. In this case the Court seemingly went somewhat out of its way to discuss aesthetics. Mr. Justice Douglas, who spoke for a unanimous Court, said in part as follows:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community

> should be beautififul as well as health, spacious as well as clean, well-balanced as well as carefully patrolled . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

Prior to the decision in Berman v. Parker, supra, the rule that aesthetic considerations alone cannot justify the exercise of the police power has retreated but little, and then only grudgingly.

The battleground on which the controversy over aesthetics has been fought has been almost exclusively an urban one. One need only recall the ugliness of the typical city of the early 1900's, with its disordered jumble of residences, tenements, stores, factories and junk yards, all-too-freely interspersed with a riot of billboards, to realize that aesthetic considerations were given scant heed by our forefathers, and to realize as well that the force of circumstances was building up great pressure for the recognition of such considerations. As was probably inevitable, the recognition did come, but so strong was the aversion in the courts to interference with property rights that all manner of subterfuge was used by the legislatures to mask their real purpose. And, occasionally, where the legislature failed to clothe an aesthetic objective in the respectable raiment of health, good morals or safety, a sympathetic could would itself so attire the naked stranger and send him on his way, sustained and found constitutional.

The building height regulations and the cases

wherein their constitutionality was litigated provide examples of this effective but unfortunately necessary subterfuge. The billboard cases show, in general, the same pattern of gradual change in judicial attitude as do those concerned with maximum building heights. While the overwhelming majority of courts would not at first accept regulation based on public health, an early federal case, In re Wilshire, 103 Fed 620, arising from an ordinance of Los Angeles which limited signs to a height of six feet, signaled the birth of a contrary view which in time was to become widely accepted. There the court took notice of the fact that many signboards were "cheap and flimsy affairs" which could be blown down or toppled in an earthquake, to the injury of passing pedestrians, and on this basis upheld the ordinance as a valid exercise of the police power. The door to restriction was open, and in years to come, the legislatures and courts were to discover more and more ways in which billboards "menaced the public."

Petitioner feels that the case of Berman v. Parker, supra, overturns the prior cases in opposition, it being perhaps peculiarly within the prerogative of the Supreme Court of the United States to overturn a rule of law by implication especially where the discarded rule was laid down in a time when accepted social and legal philosophies were so different from what they are now. Petitioner feels that the Court was recognizing that the attractiveness of a community affects the mental and physical health of its inhabitants, and that aesthetics cannot be considered apart from health, safety, morality and the general welfare.

Petitioner feels that the question of aesthetics may not be fully resolved until it is again presented to the

Supreme Court in a case which turns more directly upon aesthetic considerations.

Petitioner also feels that even under the old "Rule of Aesthetics" the city ordinance should have been upheld on appeal. Primarily it is up to the legislature to enact laws when such laws are essential, and the courts reviewing same should not disturb the legislature's determination unless it can plainly be seen that the law has no relation to the protection of the public welfare, but is a clear invasion of personal or property rights under the guise of police regulation. Every intendment is to be indulged in favor of the validity of the ordinance attacked and all doubts resolved in a way to uphold the law-making power; an ordinance must be very clearly obnoxious to an objection that it is unreasonable and oppressive before it will be declared invalid by the courts. Nebbia v. New York (1934), 291 U.S. 502.

In the instant case there were several substantial reasons given for the requirement, in the ordinance, that junk dealers enclose their premises with a solid fence. Among these reasons were the possibility of attractive nuisance and prevention of the spread of fire. Every intendment is to be indulged in favor of the ordinance attacked and all doubts resolved in a way to uphold the lawmaking power.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that certiorari should be granted.

J. F. DuPAUL, City Attorney

BY AARON W. REESE and

FREDERICK B. HOLOBOFF

Attorneys for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

FILED JUN 19 1959

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	SUPERIOR COURT NO. CR-770 MUNICIPAL COURT NO. 72288
vs.	OPINION
EDGAR WILLIAM DICKENSON, Defendant and Appellant.	

APPEAL from judgment of the Municipal Court, San Diego Judicial District, State of California. Honorable Luther N. Hussey, Judge.

Prosecution for violation of Sections 33.0903.1 and 33.0903.7 of the Municipal Code of San Diego. Reversed as to Section 33.0903.1. Affirmed as to Section 33.0903.7.

J. F. DuPaul, City Attorney, by Shearn Platt, Deputy City Attorney, for Plaintiff and Respondent.

Swing, Scharnikow & Staniforth, by Robert O. Staniforth, for Defendant and Appellant.

MONROE, J.

In 1956, prosecution of the defendant was commenced for seven alleged violations of the Municipal Code of San Diego regulating the auto wrecking business. Heretofore five of these counts have been disposed of. The defendant sought a Writ of Prohibition in the Superior Court upon the ground that the ordinance was unconstitutional, but the Superior Court ruled, and it was affirmed by the District Court of Appeal, that the question was one which could and should be properly determined upon the trial of the case. The case was therefore tried, and the defendant having been found guilty of two separate violations, this appeal is taken.

The sole question for determination is the validity of the two sections of the ordinance governing the auto wrecking business involved. No contention is made with reference to the sufficiency of the evidence, and it may be taken as conceded that if these sections are valid enactments the judgment of conviction should be affirmed.

The first section in question is number 33.0903.1, concerning the fencing. It is provided that such an establishment is to be surrounded by a solid fence or wall

at least six feet in height. A similar ordinance was before the Court in People v. Sevel, 120 Cal. App. 2d 907, decided by the Appellate Division of this Court. It was there held that an ordinance requiring such an establishment to be surrounded by a fence was a valid and constitutional enactment. The point involved in this case, however, was not considered by the Court in that decision. It is conceded that it is entirely within the power and discretion of the municipality to require that an establishment of this character be surrounded by a fence. The defendant contends, however, that the requirement that the fence be solid is for no other purpose than the aesthetic one of screening an unsightly business from the view of the passing public.

There can be no question of the general proposition that ordinances of this character must be confined to regulations relative to the health, morals or safety, or the general public welfare. (Ex parte Quarg, 149 Cal. 79; Frost v. City of Los Angeles, 181 Cal. 22.) It follows, therefore, that the provision that has for its purpose the aesthetic one of regulating unsightly things must be held to be an unreasonable interference with the right to carry on a lawful and legitimate business. (Verney & Green v. Williams, 155 Cal. 318.)

This Court is unable to find any substantial reason for the requirement that the fence be solid, other than the purpose of screening the contents of the yard from public view. Other provisions of the ordinance give indication of that purpose, and no other reason for the requirement has been called to the attention of the Court. In this case the defendant has been charged and convicted with the offense of failing to enclose his yard in such solid fence.

The reasoning of the Court in City of New Orleans v. Southern Auto Wrecker Inc. (La.) 192 Southern 523, relied upon by defendant, although not binding upon the courts of California is nevertheless persuasive. It would seem that the legitimate purposes of requiring the fencing of the yard would be satisfied by the requirement of a substantial fence. As contended by defendant, a chain link fence ought to be sufficient for those purposes. It must be held, therefore, that insofar as the ordinance seeks to require the fence to be solid, the section in question is unconstitutional, and inasmuch as defendant was prosecuted for filure to surround his place of business with that type of fence, the conviction must be reversed. Those sections of the ordinance referring to the manner in which the fence must be painted are not involved in this appeal.

The other section involved is number 33.0903.7, in which it is required that the premises shall be so arranged that reasonable inspection or access to all parts of the premises can be had at any time by proper fire, health, police and building authorities.

Appellant contends that this statute is vague and unreasonable and therefore void, because it does not furnish any test except "reasonableness". It is contended that therefore the proprietor of the business does not know what manner of arrangement will constitute a violation, and the same identical arrangement might be held to be a misdemeanor by one court and be held proper by another.

It cannot properly be said that the mere fact that an enactment is based upon the test of reasonableness renders the enactment vague or uncertain or invalid so

long as there be prescribed a test to be applied to determine that reasonableness. For example, the requirement of the California Vehicle Code, Section 510, setting forth the basic speed law is based entirely upon reasonableness, but it is prescribed that the speed must be reasonable in view of certain things to be taken into consideration. This requirement has been uinformly upheld. Applying this test to the ordinance in question, we find the requirement to be that the premises must be so arranged as to permit a reasonable inspection by those authorities charged with making inspection of the premises to see that the law is complied with. There is no attempt to set forth the exact manner of arrangement, the size or width of piles or the area between those piles. All that is required is that any arrangement desired by the proprietor must be such as will permit the reasonable inspection. It is the opinion of this Court that the ordinance thereby lays down the test for reasonableness. This has nothing to do with any aesthetic matter, nor is it vague or uncertain, because it merely requires an arrangement such as will permit reasonable access for a definite purpose. It is difficult to see how a provision of this character could be made more definite and certain without involving indefinite requirements which very well might be entirely oppressive by reason of the different manner of carrying on different businesses. It must be held, therefore, that this section of the ordinance is valid and that the conviction of the defendant for a violation thereof is therefore affirmed.

MONROE J.

WE CONCUR:

GLEN P. J.

SHELL J.

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest June 22 1959

R. B. JAMES, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By M. Morefield, Deputy

(SEAL)